Desa Teck Guan Koko Sdn Bhd v Sykt Hap Foh Hing (suing as a firm)

HIGH COURT (KOTA KINABALU) — ORIGINATING MOTION NO 12 OF 1986
IAN CHIN J
9 APRIL 1994

Civil Procedure *— Appeal — Agreement to extract timber from land — Extraction of timber agreement repudiated and timber extraction licence cancelled — Whether arbitrator erred in law in finding that claimant could not continue to extract timber under the terms of the extraction agreement without a timber extraction licence — Whether timber extraction licence required under the law for axtraction from alienated land — Forests Enactment 1968 (Sabah) ss 23 & 24*

Contract *— Repudiation — Agreement to extract timber from land — Extraction of timber agreement repudiated by applicant — Whether repudiation of contract accepted by claimant — Whether arbitrator erred in law when he failed to consider whether claimant had elected to repudiate agreement — Contracts Act 1950 s 40*

Contract *— Breach — Agreement to extract timber from land — Extraction of timber agreement repudiated by applicant and timber extraction licence cancelled by Forestry Department — Whether act of stopping claimant from extracting timber was act of third party, ie the Forestry Department — Whether action should be based on tort and therefore arbitrator had no jurisdiction*

Arbitration *— Award — Setting aside — Situations when court can interfere*

The claimant was a partnership firm with two partners, one of whom was Chung Kim Fui. The applicant was at all relevant times, the owner of a parcel of land ('the said land') and the holder of a licence ('the timber licence') issued under s 24 of the Forests Enactment 1968 (Sabah). The timber licence authorized the applicant to extract timber from the said land. On 16 April 1981, the applicant empowered one Chung Kim Siong, the sole proprietor of Sykt Wei Siong, and who is the brother of Chung Kim Fui, to extract, remove, sell and export all merchantable timber from the said land. By an agreement of the same date, the applicant sold all the timber to be extracted from the land to Sykt Wei Siong. Some two months later, the claimant and the applicant entered into an extraction agreement under which the claimant was to extract merchantable timber from 3,000 acres of the said land. Pursuant to the extraction agreement, the claimant began extracting the timber and the claimant was paid under the extraction agreement by Sykt Wei Siong on behalf of the applicant. On 28 October 1982, the applicant wrote to the then Forestry Department informing them that the extraction agreement between them and Sykt Wei Siong had ended and that all timber extraction by Sykt Wei Siong should cease immediately. Pursuant to this letter, the Forestry

Department wrote to Sykt Wei Siong on 5 November 1982, cancelling the timber licence.

The arbitrator gave an award in favour of the claimant for the sum of RM203,683.68, interest and costs. The applicant applied to set aside the award on the grounds that:

(1) the arbitrator erred in law in finding that the claimant could not continue to extract timber under the terms of the extraction agreement without a timber extraction licence;
(2) the arbitrator erred in law by misdirecting himself in arriving at the conclusion that the applicant had repudiated the extraction agreement;
(3) the arbitrator had failed to consider all the facts and circumstances of the case giving rise to the legal issues of whether or not the claimant had in fact lost their right of termination;
(4) the arbitrator's finding of fact that the claimant and Sykt Wei Siong were separate legal entities was inconsistent with and contradicts the arbitrator's conclusion that a letter dated 28 October 1982 from the claimant to the Forestry Department amounted to a repudiation of the extraction agreement when the letter was directed at Sykt Wei Siong; and
(5) the arbitrator's award was void or given outside his jurisdiction because the action of the claimant was based on tort.

Held, setting aside the award:

(1) Although, according to the law, a timber licence was not necessary for extracting timber on alienated land, the claimant and the applicant thought that the timber licence was crucial. They, therefore, would be able to put an end to the extraction agreement since they thought that without that timber licence, the extraction could not continue. Although the arbitrator had made an error as to the law in assuming that a timber licence was essential, that error was not the basis of his award because it was not necessary for him to decide whether the law requires a timber licence for the extraction of timber from alienated land. Therefore the award could not be set aside on the first two grounds.
(2) Whether a repudiation of the extraction agreement was accepted involved the determination of whether the claimant had elected to treat the extraction agreement as still subsisting. If the claimant had elected to treat the extraction agreement as still subsisting, he would have the right to insist on the performance of the contract. And if the claimant had accepted the repudiation, and regard the extraction agreement as at an end, he can sue for damages. It was clear from the clauses of the extraction agreement that it was a term of the agreement that the claimant had to haul and tow the logs. The claimant had continued the hauling and towing of timber after the Forestry Department had issued the letter of 5 November 1982 to Sykt Wei Siong to cancel the licence. It

could possibly be inferred from those acts of the claimant, that they intended to go on with the contract regardless of the breach. More so when one takes into account the letter of the claimant by which the claimant maintained that they would continue the extraction operation. Therefore, if such acts of the claimant could result in the inference that the extraction agreement, despite the repudiation, had been affirmed by the claimant, how then, could it be said, as the arbitrator had said that those facts were 'irrelevant'. So, here, the arbitrator had misdirected himself by failing to consider whether from the facts it could be inferred that the claimant had elected to keep the extraction agreement alive after its repudiation by the applicant.

(3) The arbitrator had correctly made a finding of fact that the applicant in writing to the Forestry Department had intended to prevent the extraction of timber by the claimant even though the letter was directed at Sykt Wei Siong, and there was no inconsistency.

(4) The breach which gave rise to the claimant's cause of action against the applicant was the act of the applicant in writing the letter to the Forestry Department to stop Sykt Wei Siong from further extracting timber on the land. It was that act of the applicant which resulted in the cancellation of the timber licence and the termination of all extraction operations of the claimant on the said land. Therefore, the act of stopping the claimant from extracting the timber was not an act of a third party (ie the Forestry Department) as claimed and the action against the applicant could not be based on tort.

Per curiam:
If there is a mistake of law on the face of the award of an arbitrator, that makes the award bad, the courts can interfere and the award can be set aside, but if a specific question of law was submitted to an arbitrator for his decision, and he decides it, the fact that the decision was erroneous does not make the award bad on its face so as to permit its being set aside.

[Bahasa Malaysia summary

Pihak menuntut merupakan suatu firma perkongsian dengan dua orang rakan kongsi, salah seorang daripadanya adalah Chung Kim Fui. Pemohon, pada masa yang material, merupakan pemilik sebidang tanah ('tanah itu') dan pemegang suatu lesen ('lesen kayu balak itu') yang telah dikeluarkan di bawah s 24 Enakmen Perhutanan 1968 (Sabah). Lesen kayu balak itu memberi kuasa kepada pemohon untuk mengeluar kayu balak dari tanah itu. Pada 16 April 1981, pemohon memberi kuasa kepada seorang yang bernama Chung Kim Siong, tuan punya tunggal Sykt Wei Siong, dan yang merupakan abang Chung Kim Fui, untuk mengeluar, memindah, menjual dan

mengeksport kesemua kayu balak yang boleh dagang daripada tanah itu. Melalui suatu perjanjian pada tarikh yang sama, pemohon telah menjual kesemua kayu balak yang akan dikeluarkan dari tanah itu kepada Sykt Wei Siong. Lebih kurang dua bulan kemudian, pihak menuntut dan pemohon telah mengikat suatu perjanjian pengeluaran di mana pihak menuntut akan mengeluarkan kayu balak yang boleh dagang dari 3,000 ekar tanah itu. Mengikut perjanjian pengeluaran itu, pihak menuntut mula mengeluarkan kayu balak itu dan pihak menuntut telah di bayar di bawah perjanjian pengeluaran itu oleh Sykt Wei Siong bagi pihak pemohon. Pada 28 Oktober 1982, pemohon telah menulis kepada Jabatan Perhutanan dan memberitahu mereka bahawa perjanjian pengeluaran di antara mereka dan Sykt Wei Siong telah berakhir dan kesemua pengeluaran kayu balak oleh Sykt Wei Siong sepatutnya berhenti serta-merta. Susul daripada surat itu, Jabatan Perhutanan telah menulis kepada Sykt Wei Siong pada 5 November 1982 untuk membatalkan lesen kayu balak itu.

Penimbangtara itu telah memberi suatu award memihak kepada pihak menuntut untuk jumlah RM203,683.68, faedah dan kos. Pemohon telah memohon supaya award itu diketepikan atas alasan bahawa:

(1) penimbangtara itu telah membuat kesilapan dari segi undang-undang apabila membuat keputusan bahawa pihak menuntut tidak boleh terus mengeluarkan kayu balak itu di bawah terma perjanjian pengeluaran itu tanpa suatu lesen pengeluaran kayu balak;

(2) penimbangtara itu telah membuat kesilapan dari segi undang-undang kerana beliau telah salah arahkan dirinya apabila membuat keputusan bahawa pemohon telah menolak perjanjian pengeluaran itu;

(3) penimbangtara itu telah gagal mempertimbangkan kesemua fakta dan keadaan kes itu yang membangkitkan isu undang-undang mengenai sama ada pihak menuntut itu pada hakikatnya telah kehilangan haknya untuk menamatkan perjanjian itu;

(4) keputusan fakta penimbangtara itu bahawa pihak menuntut dan Sykt Wei Siong merupakan entiti berasingan dari segi undang-undang adalah tidak konsisten dan menyangkal keputusan penimbangtara bahawa surat yang bertarikh 28 Oktober 1982 daripada pihak menuntut kepada Jabatan Perhutanan itu merupakan suatu penolakan perjanjian pengeluaran itu apabila surat itu ditujukan kepada Sykt Wei Siong; dan

(5) award penimbangtara itu adalah tidak sah atau telah diberi di luar bidang kuasanya kerana tindakan pihak menuntut berasaskan tort.

Diputuskan, mengetepikan award itu:

(1) Walaupun, menurut undang-undang, suatu lesen kayu balak tidak diperlukan untuk mengeluarkan kayu balak di sebidang tanah

berimilik, pihak menuntut dan pemohon menganggap bahawa lesen kayu balak itu adalah sangat penting. Oleh itu, mereka akan dapat menamatkan perjanjian pengeluaran itu kerana mereka berpendapat bahawa pengeluaran itu tidak boleh diteruskan tanpa lesen kayu balak itu. Walaupun penimbangtara telah membuat suatu kesilapan dari segi undang-undang apabila beliau menganggap bahawa lesen kayu balak itu adalah sangat penting, kesilapan itu tidak menjadi asas awardnya kerana beliau tidak perlu memutuskan sama ada undang-undang memerlukan lesen kayu balak untuk pengeluaran kayu balak dari sebidang tanah yang berimilik. Oleh itu, award itu tidak boleh diketepikan atas kedua-dua alasan yang pertama.

(2) Perlu diputuskan sama ada pihak menuntut telah membuat pilihan untuk menganggap bahawa perjanjian pengeluaran itu masih kekal untuk menentukan sama ada penolakan perjanjian pengeluaran itu telah diterima. Jika pihak menuntut telah membuat keputusan untuk menganggap bahawa perjanjian pengeluaran itu masih kekal, beliau akan mempunyai hak untuk mendesak supaya kontrak itu dilaksanakan. Dan jika pihak menuntut telah menerima penolakan kontrak itu, dan menganggap bahawa kontrak itu telah tamat, beliau boleh mendakwa untuk mendapat ganti rugi. Adalah jelas daripada fasal perjanjian pengeluaran itu bahawa ia merupakan terma perjanjian itu bahawa pihak menuntut itu mesti mengangkut dan menarik kayu balak. Pihak menuntut telah terus mengangkut dan menarik kayu balak itu selepas surat bertarikh 5 November 1982 itu dihantar oleh Jabatan Perhutanan kepada Sykt Wei Siong untuk membatalkan lesen itu. Kesimpulan yang wajar boleh dibuat daripada perbuatan pihak menuntut bahawa mereka ingin melaksanakan kontrak itu tidak mengira kemungkiran itu. Lebih-lebih lagi apabila surat pihak menuntut diambil kira di mana pihak menuntut menegaskan bahawa mereka akan meneruskan operasi pengeluaran itu. Oleh itu, jika perbuatan pihak menuntut yang sedemikian akan menghasilkan inferens bahawa pihak menuntut menganggap bahawa perjanjian pengeluaran itu masih kekal, walaupun perjanjian itu telah ditolak, bagaimana pula boleh dikatakan, seperti yang dikatakan oleh penimbangtara, bahawa fakta-fakta itu adalah 'tidak relevan'. Jadi, di sini, penimbangtara telah salah arahkan dirinya apabila beliau gagal mempertimbangkan sama ada daripada fakta beliau boleh membuat inferens bahawa pihak menuntut telah membuat pilihan untuk meneruskan perjanjian pengeluaran itu selepas penolakan oleh pemohon.

(3) Penimbangtara telah membuat keputusan fakta yang betul bahawa pemohon bertujuan untuk menghalang pihak menuntut daripada mengeluarkan kayu balak apabila pemohon menulis surat kepada Jabatan Perhutanan walaupun surat itu telah ditujukan kepada Sykt Wei Siong, dan tidak terdapat butir yang tidak konsisten.

(4) Kemungkiran perjanjian yang menimbulkan kausa tindakan pihak menuntut terhadap pemohon adalah tindakan pemohon menulis surat kepada Jabatan Perhutanan untuk menghalang Sykt Wei Siong daripada terus mengeluarkan kayu balak daripada tanah itu. Tindakan pemohon itulah yang mengakibatkan supaya lesen kayu balak itu dibatalkan dan penamatan semua operasi pengeluaran pihak menuntut di atas tanah itu. Oleh itu, tindakan menghalang pihak menuntut daripada mengeluarkan kayu balak tidak merupakan tindakan pihak ketiga (iaitu Jabatan Perhutanan) seperti yang dikatakan dan tindakan terhadap pemohon tidak boleh berasaskan tort.

Per curiam:
Jika terdapat kesilapan undang-undang pada muka award seseorang penimbangtara, yang menjadikan award itu salah, mahkamah boleh bercampur tangan dan award itu boleh diketepikan, tetapi jika sesuatu soalan spesifik undang-undang dihujahkan di hadapan seseorang penimbangtara untuk keputusannya, dan beliau memutuskannya, hakikat bahawa keputusan itu adalah salah tidak membuat award itu salah pada mukanya supaya ia akan diketepikan.]

[*Editorial Note*: The claimant has appealed to the Supreme Court.]

Notes
For cases on the repudiation of a contract, see 3 *Mallal's Digest* (4th Ed) paras 1397–1401.
For cases on the setting aside of an arbitrator's award, see 1 *Mallal's Digest* (4th Ed) paras 590–604.

Cases referred to
1 *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571; [1980] 1 WLR 277 (refd)
2 *Chai Ming v The Overseas Assurance Corp Ltd* [1962] MLJ 282 (refd)
3 *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592 (refd)
4 *Re King and Duveen & Ors* [19131 2 KB 32 (refd)
5 *Kelantan Government v Duff Development Co Ltd* [1923] AC 395 (refd)
6 *The A-G of Singapore v Wong Wai Cheng* [1980] 1 MLJ 131 (refd)
7 *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 (refd)

Legislation referred to
Contracts Act 1950 s 40
Forests Enactment 1968 (Sabah) ss 23, 24

Colin Lau (*Szetu & Kong*) for the applicant. A
Lawrence Chong (*Yong & Chia*) for the claimant.

Cur Adv Vult

Ian Chin J: This is an application by Desa Teck Guan Koko Sdn Bhd ('the applicant') to set aside the award of an arbitrator dated 6 August 1986, given in favour of Sykt Hap Foh Hing ('the claimant') for the sum of RM203,683.68, interest and costs. The grounds advanced by the applicant for setting aside the award were briefly as follows: B

(1) that the arbitrator erred in law in finding that the claimant could not continue to extract timber under the terms of a timber extraction agreement dated 18 June 1981 ('the extraction agreement') without a timber extraction licence; C
(2) that the arbitrator erred in law by misdirecting himself in arriving at the conclusion that the applicant had repudiated the extraction agreement;
(3) that the arbitrator had failed to consider all the facts and circumstances of the case giving rise to the legal issues of whether or not the claimant had in fact lost their right of termination; D
(4) that the arbitrator's finding of fact that the claimant and Sykt Wei Siong are separate legal entities is inconsistent with and contradicts the arbitrator's conclusion that a letter dated 28 October 1982 from the claimant to the Forestry Department amounted to a repudiation of the extraction agreement, when the letter was directed at Sykt Wei Siong; and E
(5) that the arbitrator's award is void or given outside his jurisdiction because the action of the claimant is based on tort.

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Facts of the case

The claimant was a partnership firm with two partners called Chung Kim Fui and Thien Chee Kiong, while the applicant was at all relevant times, the owner of a parcel of land measuring 6,773 acres ('the said land') and the holder of a Licence To Take Forest Produce No FOSS 18/81 ('the timber licence') issued under s 24 of the Forests Enactment 1968. The timber licence authorized the applicant to extract timber from the said land. The applicant had on 16 April 1981, empowered one Chung Kim Siong, the sole proprietor of Sykt Wei Siong and who is the brother of Chung Kim Fui, to extract, remove, sell and export all the merchantable timber from the said land. By an agreement of the same date, the applicant sold all the timber to be extracted from the land to Sykt Wei Siong. Some two months later, the claimant and the applicant, on 18 June 1981, entered into the extraction agreement under which the claimant were to extract merchantable timber from 3,000 acres of the said land. Pursuant to the extraction agreement, the claimant entered the land with machinery and began the extraction of timber. The claimant were paid their dues under the extraction agreement by Sykt Wei Siong who paid on behalf of the applicant. There G H I

did not appear to be any differences between the parties until the letter of 28 October 1982, which the applicant wrote to the Conservator of Forests (as that office was then known) in the following terms:

> 28 Oktober 1982
>
> Pemelihara Hutan,
> Jabatan Hutan,
> Sandakan
>
> Tuan
>
> Per: Penamatan perjanjian pengeluaran kayu balak di bawah Provisional Lease No 096290112
>
> Dengan sukacitanya, kami ingin memberitahu tuan bahawa perjanjian pengeluaran kayu balak yang ditandatangani di antara Sykt Wei Siong, kontraktor kayu balak, dan Desa Teck Guan Koko Sdn Bhd, memilik tanah, telah tamat pada 16 Oktober 1982.
>
> Bagaimanapun, semua pengeluaran kayu balak oleh kontraktor itu mesti berhenti dengan segera mulai hari ini 28 Oktober 1982 sehingga notis selanjutnya.
>
> Kerjasama tuan dalam perkara ini sangatlah dihargai.
>
> Terima kasih.
>
> Yang benar
> —Sgd—
> Lai Fook Chun
> for Desa Teck Guan Koko Sdn Bhd

Pursuant to this letter, the Forestry Department wrote to Sykt Wei Siong (Sandakan) Sdn Bhd by a letter dated 5 November 1982, and cancelled the timber licence. Those are in-fact all the facts of this case. Since the various conclusions of the arbitrator have been assailed, it is necessary to set out verbatim some parts of the reasons of the arbitrator which I will do when I deal with the respective grounds advanced for setting aside the award of the arbitrator. With that, I will proceed to deal with the grounds urged by Mr Colin Lau, counsel for the applicant, and give my decisions.

Grounds of appeal

The first two grounds can be conveniently dealt together because they both dealt with the question of whether the extraction agreement was repudiated by the applicant. It will be recalled that the first of the grounds was that the arbitrator erred in law in finding that the claimant could not continue to extract timber under the terms of the extraction agreement without a timber licence. Mr Colin Lau referred to the following two sentences of the arbitrator with regard to this issue, viz:

> ... it was obvious that the [applicant] intended to terminate the [extraction agreement] by writing exh C–2 (exh HNM–3) as they must had known that without the timber licence the claimant could not continue to extract timber.
>
> ... could not be taken to mean, as counsel would have it, that no timber licence is necessary to extract timber from private land. Such a view is contrary to the provisions of the Forests Enactment 1968 ...

Mr Colin Lau submitted that from those two sentences, the arbitrator was clearly of the view that without a timber licence, the timber could not be extracted by the claimant. Mr Colin Lau also argued that the letter from the applicant to the Forestry Department referred to a Sykt Wei Siong, against which the Forestry Department was asked to take action, and therefore, cannot be construed as disclosing the intention of the applicant to repudiate the extraction agreement which was made with the claimant. The court was referred to *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*[1] at p 589, where it is said:

> In the *Spettabile* case (1919) 121 LT 628, Atkin LJ said of the various definitions of repudiation: 'They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract *made quite plain* his own intention not to perform the contract'. (Emphasis provided.)

Mr Lawrence Chong, on the other hand, argued that the arbitrator's finding must be read in its context. That proposition of law cannot be disputed and it was in fact from the following passages of the reasonings of the arbitrator that the two separate sentences, quoted by Mr Colin Lau, are taken from, viz:

> Fourth issue
>
> I now turn to consider two other important submissions of counsel for the [applicant]. First, he submitted that as the order (exh C–1) of the Forestry Department was not addressed to the claimant, it could not have stopped their extraction operations, and that the [applicant] had no intention to terminate the [extraction agreement]. [The applicant's] intention, he submitted, was to terminate the [timber sales agreement] with Sykt Wei Siong. But, Sykt Wei Siong was not the extraction contractor and had no extraction operations conducted under the [timber sales agreement]; all the [timber sales agreement] gave them was a right to buy exclusively the merchantable timber, if any, extracted from the said land. Thus it was unnecessary to ask the Forestry Department to stop the extraction if the intention were to terminate the [timber sales agreement]. The claimant was the extraction contractor, and it was obvious that the [applicant] intended to terminate the [extraction agreement] by writing exh C–2 as *they must have known that without the timber licence the claimant could not continue to extract timber.*
>
> Fifth issue
>
> Next, Mr Shim submitted that notwithstanding the stoppage ordered by the Forestry Department, the claimant managed to continue extraction operations albeit unlawfully. In other words, the claimant did not accept the repudiation of the [extraction agreement]. He relied on the letter dated 18 November 1982 written by the Forestry Department to the [applicant] (exh C–6), the letter dated 15 November 1982 from the claimant (exh C–3) and production record (exh C–5). As for exh C–6, it dealt with the removal of timber already felled and not standing timber. This is apparent from the fact that it was a reply to exh C–7 (letter dated 17 November 1982 from Sykt Wei Siong which asked about, inter alia, the timber already felled.) Thus, the statement in exh C–6 that 'as it is a private land it is up to you to do the stopping' could only refer to the removal of felled timber. *Exhibit C–6 could not be taken to mean, as counsel would have it, that no timber licence is necessary to extract timber from private land. Such a view is contrary to the provisions of the Forests Enactment 1968. Further, there is nothing in exh C–6 to suggest that the order (exh C–1) of the said Department is revoked.*

The production record (exh C–5) clearly showed that production ended in November 1982. Counsel was correct in pointing out that logs were being removed from the said land after 5 November 1982 as was apparent from rafts 10, 11, 12 and 13 shown in exh C–5. But these were timber felled by the claimant before their operations were stopped. This fact is proved not only by the evidence of the claimant (CW1) but also that of the [applicant] (RW1) who said that after the timber licence was cancelled he saw a large heap of logs in the said land and that the workers, equipment and machinery of the claimant were not working. Exhibit C–16 (letter dated 3 December 1982 from Sykt Wei Siong to the Forestry Department) also confirmed that 3,000m^3 of logs needed to be towed away. Although the claimant had in their letter (exh C–3) said that they would continue extraction operations, CW1 explained in evidence, which I accept, that they were subsequently ordered by forest officers to stop extraction operations (exh C–1) and the other documentary evidence produced, notably the production record (exh C–5) which showed that the production in the said land ended in November 1982. This is further fortified by the fact that removal passes were required to remove all felled timber, and the claimant's solicitors' letter dated 21 March 1983 (exh C–4).

Mr Shim seems to suggest in his submission that the acts of hauling and towing the felled timber to the log pond after the timber licence was cancelled meant that the claimant had carried on extraction operations within the meaning of the [extraction agreement]. The claimant lost the right to fell more standing timber as a result of the cancellation of the timber licence. This is the crux of their case, and with respect, the fact that the claimant continued to haul and tow away those timber already felled is therefore irrelevant.

Mr Lawrence Chong argued that it was a finding of fact when the arbitrator found that the applicant had intended, by their letter to the Forestry Department, to terminate the extraction agreement. I am in agreement with him. It was envisaged, even though they may have misunderstood the law, that the timber licence was required for the purposes of the extraction agreement and hence, provision was made in the extraction agreement for the timber licence. Therefore, since the claimant and the applicant thought that the timber licence was crucial, it was possible for the applicant to have thought that without it, the extraction agreement could be brought to an end. That, in effect, was the reasoning of the arbitrator for his conclusion, on a factual basis, that the claimant cannot continue to extract timber because both parties had thought, as shown by the provision in the extraction agreement for such a timber licence, that the timber licence was essential when in law such a timber licence was not necessary for extracting timber on alienated land. It matters not that the arbitrator was also under the same erroneous belief as that of the parties that a timber licence was required. The parties proceeded on the assumption that the timber licence was required and the arbitrator found that the applicant thought that, by getting the Forestry Department to cancel the timber licence, they would be able to put an end to the extraction agreement since they all thought that without the timber licence, the extraction cannot continue. I have said that a timber licence is not required; this can be gathered from the following provisions of the Forests Enactment 1968 (Sabah), viz:

> 23 ... any person who (a) fells ... any forest produce on any State land; or (b) removes any forest produce on any alienated land beyond the boundaries of that land, shall be guilty of an offence.

24 (1) ... the Director ... may issue licences for the doing of all or any of the acts prohibited by sections ... 23 ... A

...

(5) No licence shall be issued for the doing of any act on alienated land except on the application by, or with the written permission of, the owner or Lessee of such land.

For our purposes, the said land is alienated land. It is obvious from the Forests Enactment 1968 that no licence is required for the extraction of timber from the said land. What is required, in order to remove timber away from the said land is a transit pass which can be obtained under r 15(1) of the Forest Rules 1969. B

Mr Lawrence Chong, counsel for the claimant, further argued that even if the arbitrator had erred, the award cannot be set aside, and the court was referred to the following authorities as supporting his contention. The first of the cases referred to was *Chai Ming v The Overseas Assurance Corp Ltd*[2] which held that a court cannot interfere where a specific question of law was referred to the decision of the arbitrator and the parties are bound by it even though it may be erroneous. In that case, the question of whether a tree-feller was a workman within the meaning of the Workmen's Compensation Ordinance 1952 was referred to arbitration and the arbitrator decided that he was not. The court there decided that the award cannot be interfered with and cited the following passage of *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd*[3] at p 607: C D E

> ... it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. ... The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one. F

The court then came to the conclusion that a specific question of law was referred to the arbitrator because the arbitrator, after hearing evidence, came to certain findings of facts and concluded that the tree-feller was not a workman and the arbitrator gave his reasons in law and in fact. The court there also referred to the case of *Re King and Duveen & Ors*[4] where one of submission for arbitration was: G

> (c) if such, if any, of the said flues as do emit smoke as aforesaid should continue to emit smoke after the completion of the works directed by you, if any, or if you should be of opinion that no works can usefully be done to cure such flues, then whether under the agreement ... the executors of Sir Joseph Joel Duveen are liable to pay damages in respect thereof to Mr Henry James King, and, if they are so liable, what damages should be paid; ... H

The arbitrator decided that the said executors were not liable after also holding that no further works can cure the nuisance. The court there held that the arbitrator had been referred a specific question of law and Channell J had this to say at pp 35–36: I

> It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside ...; but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator.

The next case referred to is *Kelantan Government v Duff Development Co Ltd*[5] where the points referred for decisions of the arbitrator were:

> (1) What, upon the true construction of the deed of cancellation, was the nature and extent of the obligation of the Government in regards to the making of the cart road? (2) Whether, upon the true construction of the deed of cancellation, the Government had entered into a covenant with the company to construct the railway, and if so, in what terms, and what was the nature and extent of the obligation of the Government under such covenant?

The court there said, at p 409:

> The reference, therefore, was a reference as to construction.
>
> If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally — for instance, that he decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose.

The final authority referred to is 2 *Halsbury's Laws of England* (4th Ed) at para 623, where it is said that the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award; it must take the award at its face value. There is no dispute as to the correctness of those principles of law. Mr Colin Lau referred to the case of *The A-G of Singapore v Wong Wai Cheng*[6] where it was held that the failure of the arbitrator to construe the contract, in particular, a cl 32(b) of the Conditions of Contract, and to consider all the facts and circumstances of the case, in particular the fact that the original completion date had been extended and it was within the contemplation of the parties that the time for completion was not of the essence of the contract, amounted to an error of law apparent on the face of the award. Mr Colin Lau also referred to the more recent case of *Ganda Edible Oils Sdn Bhd v Transgrain BV*[7] at pp 430–431 where it was stated:

> It was also contended by the appellant that the trial judge erred in law by holding that there was no error of law on the face of the arbitration award. In fact as stated earlier that was the ground on which the application to the judge was

based. The principles that have to be applied in the instant case may be set out as follows: A

> 'An arbitrator's award may be set aside for error of law appearing on the face to it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists B at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that it can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
>
> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the C award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, D or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.' (2 *Halsbury's Laws of England* (4th Ed) at p 334 para 623 'Error of law on face of award').

A distinction should be drawn between a case where a dispute is referred to an E arbitrator in which a question of law becomes material from the case in which a specific question of law has been referred to him. The position is that in the former case the court can interfere if and when an error appears on the face of the award but in the latter no such interference is possible upon the ground that the decision on the question of law is an erroneous one (per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land* F *Development Authority* [1971] 2 MLJ 210 at p 211). In that case, no question of law was referred to the arbitrator but what was submitted was a question of law which incidentally and necessarily arose in applying certain facts. In our considered judgment in the present appeal, a similar situation arose. It is clear that in applying certain facts which led to the dispute between the parties, the arbitrator had also to construe the provisions of s 37 of the [Sales of Goods (Malay States) G Ordinance 1957] which was relied by the respondent and also s 42 which incidentally arose in applying those facts. Since the reference involved both questions of law and fact, the High Court was in a position to review the award if and when there is an error apparent on the face of the award.

Having apprised myself of the legal principles and enlightened by the H various cases which serve to illustrate the working of the principles, I will now direct my attention to the facts of the present case. Since no complaint was directed at the summary made by the arbitrator as to what the arbitrator perceived as being the questions referred to him for decision, I will assume that his summary of the questions, or issues as the arbitrator put them, referred to him for decision, which is stated in his 'Reasons of final award', I is correct. The questions or issues for the decision of the arbitrator were these:

A (1) Did the Forestry Department stop the extraction operations of the claimant pursuant to their order as contained in exh C–17?
(2) Was such stoppage caused by the action of the respondent in asking the said Department to stop all extraction operations in the said land by their letter dated 28 October 1982 (exh C–2)?
(3) Was the [applicant] justified in asking the said Department to stop such
B operations?
(4) Whether or not by such action the [applicant] intended to terminate the [extraction agreement].
(5) Whether or not the claimant accepted the repudiation.
(6) Whether or not the [extraction agreement] was varied by increasing the price payable thereunder to RM2.50/ft³.

C It is clear from the summary, which I have just quoted, the question of whether a timber licence is required for the extraction of timber from the said land was not specifically referred to the arbitrator. In fact, I am of the view, that it was unnecessary to decide on that question because what in effect is the legal position is immaterial since the parties have assumed, even
D though wrongly, as I have stated earlier, that a timber licence was essential. I am of the opinion that though the arbitrator had made an error as to the law, that error was not the basis of his award because it was not necessary for him to decide whether the law requires a timber licence for the extraction of timber from alienated land. Therefore, the award cannot be set aside on those two grounds.

E The third ground advanced by the applicant for setting aside the award was that there was a failure to consider and appreciate that the claimant's right to termination was lost by election and there was unreasonable delay. Mr Lawrence Chong argued that these were not issues which the arbitrator was required to decide and this, Mr Lawrence Chong pointed out, can be
F gathered from the absence of any mention of such issues when the erstwhile counsel for the applicant addressed the arbitrator. Mr Colin Lau replied and said that the written submission before the arbitrator cannot be referred to because that document does not form part of the award nor was it incorporated to the award. Apart from that, Mr Colin Lau conceded that the 'unreasonable delay' point was not canvassed before the arbitrator but
G he added that the defence of election was clearly raised because the arbitrator had referred to it in the sentence: 'In other words, the claimant did not accept the repudiation of the [extraction agreement].' Actually, this sentence was immediately preceded by another sentence which reads: 'Next Mr Shim [the erstwhile counsel for the applicant] submitted that
H notwithstanding the stoppage ordered by the Forestry Department, the claimant managed to continue extraction operations albeit unlawfully'. These two statements were made in relation to Issue 5, which was whether or not the claimant accepted the repudiation. Since it was conceded that the 'unreasonable delay' point was not canvassed before the arbitrator, I
I will concern myself only with the question of election. Surely, whether a repudiation of the extraction agreement was accepted involves the determination of whether the claimant had elected to treat the extraction

agreement as still subsisting, with a resulting right to insist on its performance, or as repudiated, in which case the claimant regards the extraction agreement as at an end and can sue for damages. In any event, that this issue was referred for the decision of the arbitrator can be gathered from what the arbitrator said in connection with the fifth issue, which I have earlier set out, but part of which I repeat here, viz:

> Fifth issue
>
> Next, Mr Shim submitted that notwithstanding the stoppage ordered by the Forestry Department, the claimant managed to continue extraction operations albeit unlawfully. In other words, the claimant did not accept the repudiation of the [extraction agreement] ...
>
> Conclusions
>
> On the evidence adduced, I am satisfied that the [applicant's] extraction operations were stopped by the Forestry Department and that such stoppage was caused by the action of the [applicant] in asking the said Department to stop such operations. By such action, the [applicant] had refused to perform or disabled themselves from performing the [extraction agreement]. Such wrongful repudiation or breach gave the claimant the right to rescind the [extraction agreement] pursuant to s 40 of the Contracts Act 1950 by accepting the repudiation or breach; ... I am satisfied that the claimant accepted the repudiation and did not by their words and conduct signified their acquiescence in the continuance of the [extraction agreement] ...

What, then, were the misdirections of the arbitrator as regards his decision, if any, whether the claimant had made an election or not? Mr Colin Lau argued that the arbitrator misdirected himself when he said: '... with respect, the fact that the claimant continued to haul and tow away those timber already felled is therefore irrelevant.' It is not in dispute that, despite the alleged termination of the timber licence by the letter of the Forestry Department, the claimant continued to haul and tow timber. Mr Colin Lau argued that such acts were pursuant to a term of the extraction agreement and since the claimant continued to perform the extraction agreement, such act could only mean that the claimant had not accepted the repudiation and that the purported acceptance of the alleged breach by the claimant's solicitors' letter in March 1993 further supports this contention. Mr Lawrence Chong however argued that the arbitrator had considered all the facts and circumstances of the case giving rise to the legal issues of whether or not the claimant had lost their right of termination and the arbitrator had concluded that the claimant was prevented by the Forestry Department from extracting more timber and, therefore, there was no question of the claimant losing their right of termination. He added that the act of towing and hauling could only take place after felling and were irrelevant if no trees could be chopped down. Mr Lawrence Chong also referred to the following principle of law, which I agree, viz:

> The court should approach an award with a desire to support rather than destroy it, and presumes, unless and until the contrary is shown, that the arbitrator or umpire has by his award determined those matters, and those matters only,

A which were referred to him. The burden of proving that he has awarded on matters not referred, or that he has failed or omitted to award on matters which were referred, lies on the party who seeks to impeach the award. (2 *Halsbury's Laws of England* (4th Ed) at para 610.)

It is necessary to reproduce certain clauses of the extraction agreement to B enable the court to determine the validity of the respective arguments, viz:

1 ... the [applicant] engage the [claimant] to extract all the merchantable timbers from the said land and transport the same to a log pond or log ponds at Sandakan ... .

7 The [applicant] shall not employ any other person apart from the [claimant] to extract merchantable timbers from the said land.

C 14 The term 'extract' or 'extraction' as used in this agreement shall include all work of felling of trees cross-cutting into logs of sound merchantable timbers debarking transporting and delivery of such merchantable timbers in accordance with the term of this agreement.

It is clear from the clauses of the extraction agreement, which I have just D reproduced, that it is a term of the extraction agreement that the claimant had to haul and tow the logs to a log pond in Sandakan. The facts as found by the arbitrator were these. The claimant had continued the hauling and towing of timber after the Forestry Department had issued the letter dated 5 November 1982 to Sykt Wei Siong (Sandakan) Sdn Bhd to cancel the licence. The arbitrator had also held that Sykt Wei Siong (Sandakan) Sdn E Bhd and Sykt Wei Siong to be the 'same entity'. The arbitrator had also decided that though the letter of the applicant was directed at Sykt Wei Siong, it was nevertheless effective to repudiate the extraction agreement, which conclusion is the subject of another attack by the applicant which should not concern us for the moment.

F To return to the issue at hand, the court has now to ask whether the acts of hauling and towing timber, after the extraction agreement was repudiated by the applicant, are relevant or not for construing whether the claimant had elected to treat the extraction agreement as alive, that is, whether the claimant had refused to accept the repudiation. Without doubt, the claimant, in continuing to haul and tow the timber, which was an obligation on the G part of the claimant under the extraction agreement, after the extraction agreement was alleged to have been repudiated by the applicant, could possibly constitute an election to treat the extraction agreement as subsisting. Those are acts on the part of the claimant from which it could possibly be inferred that they intended to go on with the contract regardless of the H breach. This is more so when one takes into account the letter of the claimant, issued after the alleged repudiation, and by which the claimant maintained they would continue extraction operation. Therefore, if such acts of the claimant, which I have just referred, could result in the inference that the extraction agreement, despite the repudiation, had been affirmed by the claimant, how, then, could it be said, as the arbitrator had said and I which Mr Lawrence Chong also maintained, that those facts were 'irrelevant'.

The claimant may have thought they had lost the right to fell further trees but the claimant continued to haul and tow the logs, which was an

obligation of the claimant under the extraction agreement, after the extraction agreement was terminated. It can be asked, if the acts of towing and hauling were not pursuant to the terms under the extraction agreement, under what arrangement were the claimant still hauling and towing the timber after the extraction agreement was repudiated? If the claimant had accepted the repudiation, they would have left the said land with their machinery but they had instead remained and continued to haul and tow timber obviously pursuant to a provision of the extraction agreement. But the arbitrator had, in the concluding part of his reasoning, said: '*I am also satisfied that the claimant accepted the repudiation and did not by their words and conduct signified their acquiescence in the continuance of the [extraction agreement]*. Does that mean that the arbitrator had taken the acts of hauling and towing into consideration but had found them not to constitute an acquiescence in the continuance of the extraction agreement? It cannot be so, because he had stated that those acts were 'irrelevant' and not that they do not constitute 'acquiescence'.

The parties have argued their case on the assumption that once there was an election to keep the extraction agreement alive, the claimant lost its right to sue. I will defer to that proposition because the parties have apparently agreed and there was no dispute to the following authority, 1 *Chitty on Contracts* (26th Ed) at para 1702, that was cited, viz:

> Affirmation. Where the innocent party, being entitled to choose whether to treat the contract as continuing or to accept the repudiation and treat himself as discharged, elects to treat the contract as continuing, he is usually said to have 'affirmed' the contract. He will not be held to have elected to affirm the contract unless, first, he has knowledge of the facts giving rise to the breach, and, secondly, he has knowledge of his legal right to choose between the alternatives open to him. Affirmation may be expressed or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated. Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract. Mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach. But if the innocent party unreservedly continues to press for performance or accepts performance by the other party after becoming aware of the breach and of his right to elect, he will be held to have affirmed the contract.
>
> Once the innocent party has elected to affirm the contract, and this has been communicated to the other party, then the choice becomes irrevocable. There is no need to establish reliance or detriment by the party in default. Thus the innocent party, having affirmed, cannot subsequently change his mind and rely on the breach to justify treating himself as discharged. Nevertheless, in the case of a breach which is persisted in by the other party, the fact that the innocent party has continued to press for performance will not normally preclude him at a later stage from treating himself as discharged. Nor in the case of an ongoing contract, will affirmation in respect of one breach preclude him from treating himself as discharged by reason of further subsequent breaches.

So, here the arbitrator had misdirected himself by failing to consider whether from the facts which I have related, it could be inferred that the claimant had elected to keep the extraction agreement alive after its repudiation by the applicant. Mr Lawrence Chong submitted that because the Forestry Department had stopped all extraction operations, it was not possible for the claimant to elect to continue extraction even if they wanted to and this, according to Mr Lawrence Chong, is what the arbitrator had found. I reproduce Mr Lawrence Chong's argument in full, viz:

> Although the claimant wrote (vide C–3) that they were continuing with the extraction of timber, this was in relation to the interim period pending clarification from the [applicant]. As a matter of fact, the claimant had to abruptly stop felling of timber when the Forestry Department ordered the stoppage of all extraction operations in November 1982 (see p 15 of reasons for award). Hence the order of the Forestry Department to stop all extraction in the said land made it impossible for the claimant to elect to continue extraction operations even if they wanted to. (This is the learned arbitrator's findings — see reasons for award at pp 14 and 15 on the fifth issue ...)

Mr Lawrence Chong is echoing the same reasoning of the arbitrator in relation to the fifth issue and which I have already earlier set out but a repetition of the relevant part is necessary to bring into focus the misconception of the law, viz:

> Mr Shim seems to suggest in his submissions that the acts of hauling and towing the felled timber to the log pond after the timber licence was cancelled meant that the claimant had carried on extraction operations within the meaning of the [extraction agreement]. The claimant lost the right to fell more standing timber as a result of the cancellation of the timber licence. This is the crux of their case, and with respect, the fact that the claimant continued to haul and tow away those timber already felled is therefore irrelevant.

What was said by the arbitrator, which I have just quoted, was in relation to the fifth issue, which is, 'Whether or not the claimant accepted the repudiation'. Therefore, it cannot be true, as the arbitrator had put it, that the issue is only whether the claimant had lost the right to continue extraction of the timber. That is a serious misdirection. The fifth issue is framed on the assumption that the claimant had been stopped from further extracting or felling timber on the said land. What has to be decided is whether as a result of the said stoppage, the claimant had accepted the stoppage and thus put an end to the extraction agreement or whether the claimant had insisted on its continuance. This situation is governed by s 40 of the Contracts Act 1950 and it reads:

> Effect of refusal of party to perform promise wholly.
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Chitty on Contracts, supra, illustrates how the issue should be approached. Therefore, even though the applicant had disabled himself from performing

his part of the extraction agreement and even though the claimant were prevented from felling timber, the claimant must still elect whether to accept the repudiation and thus bring an end to the extraction agreement or insist on its continuance and thus insists on the applicant doing all that is necessary to enable the claimant to continue to extract, haul and tow the timber. In the present case, the claimant could insist on the continuation of the extraction agreement by continuing to do the acts required of the claimant, such as the hauling and the towing of the timbers under the extraction agreement, which the claimant in fact did. I have also said earlier that the claimant in fact insisted on its continuance by its said letter. The arbitrator had completely failed to direct his mind to and therefore failed to consider whether or not the acts of hauling and towing the timber after the repudiation of the extraction agreement could constitute acts from which it could possibly be inferred that the claimant had elected to continue the extraction agreement. This error is apparent on the face of the award, which I have already quoted. I have said that the facts could give rise to the inference that the claimant might have elected to keep the extraction agreement alive. Whether the claimant had really by those acts elected to keep the extraction agreement alive should properly have been the precinct of the arbitrator but he had failed to decide. From the facts of this case, it cannot be said that there was no evidence from which the arbitrator could possibly hold that the claimant had elected to keep the extraction agreement alive.

Mr Colin Lau had also argued, which is the fourth ground which I have set out, that the arbitrator had made contradictory findings of fact. He argued that the arbitrator's finding that the claimant and Sykt Wei Siong were separate legal entities was inconsistent with and contradicted the arbitrator's conclusion that the applicant had wrongfully repudiated the extraction agreement through a letter of the applicant to the Forestry Department when the letter requested action only against Sykt Wei Siong and not against the claimant. Mr Lawrence Chong's reply was that the arbitrator had made a finding of fact that the applicant in writing to the Forestry Department had intended to prevent the extraction of timber by the claimant even though the letter was directed at a Sykt Wei Siong and that there is no inconsistency. I agree with that submission of Mr Lawrence Chong. There is no error here on the face of the award.

The final argument of Mr Colin Lau sounds like this. The arbitrator in holding that the letter just referred to had the effect of stopping the claimant from extracting timber, the applicant should not be liable under the extraction agreement because the act of stopping the claimant from extracting the timber was the act of a third party, the Forestry Department. Hence, Mr Colin Lau argued that any action against the applicant must be based on tort for which the arbitrator has no jurisdiction. Again, I accept the reply of Mr Lawrence Chong which effectively answered the argument of Mr Colin Lau and it is this, I quote:

> The breach which gave rise to the claimant's cause of action against the [applicant] is the act of the [applicant] in writing [the letter] to the Forestry Department to stop Sykt Wei Siong from further extracting timber on the land. It is that act of

A the [applicant] which gave rise to the breach as it resulted in the cancellation of the timber licence and the termination of all extraction operations of the claimant on the said land. By that act the [applicant] has disabled itself from performing the [extraction agreement] and is therefore an act of repudiation. Such act by the [applicant] clearly cannot be attributed to the act of a third party.

B The applicant had succeeded in one of the five grounds for setting aside the award. I therefore set aside the award save the part that dismissed the applicant's claim. It was very unfortunate that the arbitrator did not properly direct his mind to the facts and law concerning the question of election and this had resulted in the setting aside of the award. Even though the applicant has succeeded in its motion, it is clear that the applicant was in breach of C the extraction agreement, I therefore order that the parties bear their own costs both here and below.

Order accordingly.

Reported by Jeanne Tan

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